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Supreme Court of the United States

OCTOBER TERM, 1973.

No. 73-144

LOCAL 7-210, OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO,

Petitioner,

vs.

UNION TANK CAR COMPANY,

Respondent.

BRIEF IN OPPOSITION TO GRANT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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TABLE OF CONTENTS.

PAGE

Question Presented 1

Counterstatement of the Case 2

Argument Against Granting the Writ 6

Both the Seventh Circuit and the District Court Properly Held That an Arbitrator's Award Which Conflicts with a Decision of the NLRB Cannot Be Enforced .. 6

Conclusion 11

LIST OF AUTHORITIES CITED.

Carey v. Westinghouse Electric Corp., 375 U. S. 261 (1964) 5, 7, 8, 10

Dock Loaders v. W. L. Richeson & Sons, 280 F. Supp. 402 (E. D. La. 1968) 9

IAM v. Howmet Corp., 466 F. 2d 1249 (9th Cir. 1972) . .9, 10

Ironworkers v. Lake County Council, 347 F. Supp. 1377 (N. D. Ind. 1972) 9

Local 1547, IBEW v. Local 959, Teamsters .... F. Supp. ...., 83 LRRM 2785 (D. Alaska 1973) 9

McGuire v. Humble Oil & Refining Co., 355 F. 2d 352 (2d Cir.), *cert. denied,* 384 U. S. 988 (1966) 9

NLRB v. Jones & Laughlin Steel Corp., 301 U. S. 1 (1937) 9

NLRB v. Plasterer's Local Union No. 79, 404 U. S. 116 (1971) 6

National Licorice Co. v. NLRB, 309 U. S. 350 (1940) 5, 8, 11

New Orleans Typographical Union v. NLRB, 368 F. 2d 755 (5th Cir. 1966) 9, 10

Retail Clerks v. Montgomery Ward Co., 316 F. 2d 754 (7th Cir. 1963) 9

Smith Steel Workers v. A. O. Smith Corp., 420 F. 2d 1 (7th Cir. 1969) 5, 9

Teamsters v. Ace Enterprises, Inc., 332 F. Supp. 36 (S. D. Cal. 1971) 9

U. S. Bulk Carriers, Inc. v. Arguelles, 400 U. S. 351 (1971) 6

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Respondent, Union Tank Car Company, hereby files its brief in opposition to granting the writ of certiorari in the above-captioned matter.

QUESTION PRESENTED.

Whether the Courts below erred in refusing to enforce an arbitrator's award which conflicts with a final decision of the National Labor Relations Board.

COUNTERSTATEMENT OF THE CASE.

At the outset, it should be noted what this case does not involve. There is no claim that this case is a departure from a decision of this Court; on the contrary, it is claimed that the error of the lower Courts' decisions is that those Courts directly followed decisions of this Court. Nor is it claimed that there is a conflict among the Circuits. Indeed, the decisions below are in accord with every case which has decided the issues raised here. Such unanimity of case law also underscores that this case raises no issue not already well settled under national labor policy.

This is a Section 301 action, 29 U. S. C. § 185, which has followed a litigious path to this Court. In brief, Union Tank Car Company (hereinafter referred to as the "Company") has maintained for many years two tank car facilities in Indiana. The first, East Chicago, was principally engaged in the fabrication of tank car shells and was covered by successive collective bargaining agreements with Local 374, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO (hereinafter referred to as the "Boilermakers"). The second, Whiting, was engaged in the finishing of tank cars fabricated at and shipped from East Chicago and the repair and maintenance of tank cars. The Whiting plant was covered by successive collective bargaining agreements with Local 7-210, Oil, Chemical and Atomic Workers International Union, AFL-CIO (hereinafter referred to as "OCAW").

In 1966, the Company acquired a vacant facility in East Chicago, known as Plant No. 1, directly across the street from its facility represented by the Boilermakers, where it built, for the first time in the industry, an integrated tank car manufacturing facility, where new tank cars could be built completely in one place. By June 1969, the Company had transferred employees represented by the Boilermakers to Plant No. 1, such that the plant was fully operational and was turning out com-

etely finished tank cars. At that time, it is undisputed that ıe Company's plans were to retain the Whiting facility for both nishing and repair and maintenance. In late 1969, however, ecause of serious economic conditions, the Company concluded ıat it could no longer operate dual facilities and told OCAW f its intentions to curtail finishing operations at Whiting.)CAW took the position that under its agreement, the Com- ıny was required to apply the OCAW contract to the finishing perations at Plant No. 1, a position the Company disputed both nder the OCAW contract and in light of the fact that it could ot lawfully recognize OCAW or apply the OCAW agreement t Plant No. 1 since the Boilermakers were the exclusive bar- aining representative there.

OCAW grieved, and arbitration ensued before Arbitrator Harry Platt who held not, as stated in OCAW's Petition, that he transfer of finishing operations to the new plant was pre- onditioned on applying the OCAW contract there, but rather hat the Company had violated the OCAW contract merely by ts failure to apply the OCAW contract to the finishing opera- ions at Plant No. 1.[1] Subsequently, the arbitrator issued a final ıward, ordering application of the OCAW contract to the finish- ng operations performed at Plant No. 1 and the payment of lamages during the period in which the OCAW contract was ıot so applied.[2]

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1. Thus the Arbitrator held (A. 77):

> "The Company violated Article II, Section 1 of the Agreement by failing to apply the OCAW Agreement to the finishing operation when it was moved from the Whiting Plant to Plant No. 1."

This narrow holding was reiterated by the Arbitrator in his subsequent award (A. 45):

> "The prior award in this case determined that the Company violated Article II, Section 1 of the Agreement by failing to apply the OCAW Agreement to the finishing operation when it was moved from the Whiting Plant to Plant No. 1."

2. The precise award of the Arbitrator was (A. 48):

> "(a) Contingent upon a determination by the National Labor Relations Board that it would not violate the provisions

The Platt award opened up a legal Pandora's Box. The Boilermakers filed unfair labor practice charges against the Company for dealing with OCAW vis-a-vis the finishing operations at Plant No. 1, a facility which they, not OCAW, exclusively represented. This resulted in the issuance of a complaint by the National Labor Relations Board against the Company. During the same period, OCAW filed a series of representation and unit clarification petitions with the Board, which were subsequently withdrawn. In addition, the Boilermakers filed charges under the AFL-CIO Internal Disputes Plan which resulted in an award by Arbitrator David Cole finding OCAW in violation of the AFL-CIO Constitution. The NLRB unfair labor practice litigation was eventually ended in late February 1971, with an agreement by all parties, including OCAW, that the litigation created by the Platt award would be decided through the Board's representation processes, rather than through unfair labor practice hearings.

Thereafter, the Company filed a unit clarification petition which resulted in a ruling that the "appropriate unit of Plant No. 1 is a plantwide production and maintenance unit, including the finishing operations and that the employees in this unit are presently and have been since June 1969, represented by the Boilermakers as their exclusive bargaining representative." (A. 41.) Thus, the Board ruled that the Boilermakers had been representing the employees doing finishing work at Plant No. 1 since June 1969, a full year before Arbitrator Platt's decision and six months before OCAW's grievance was even filed.

Subsequently, OCAW brought suit in Federal District Court under Section 301 seeking enforcement of the damage portion

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of the NLRA, the Company is directed to apply the existing OCAW Agreement to the finishing operations performed in Plant No. 1.

"(b) The Company is directed to reimburse and make whole all OCAW-represented employees for all lost wages and benefits, including health and welfare and retirement benefits, caused by the violation of Article II, Section 1 as heretofore determined."

the Platt award. The District Court, after a thorough review the applicable case law, dismissed the complaint and granted dgment for the Company, holding (A. 27):

> "In view of these decisions, it would appear that the law thus established is that where there is a conflict between an arbiter's award and a later NLRB ruling, the arbiter's findings must give way before the superiority of the NLRB decision. If the employer has acted in accord with the NLRB decision, it is not liable for damages."

This decision was affirmed by the Court of Appeals for the eventh Circuit which ruled that since the Boilermakers had all times been the exclusive representative for all employees Plant No. 1, including those performing finishing work, the bitrator's award requiring application of OCAW's contract ere and the payment of damages for not applying that contract as unenforceable. Finding the arbitration award in direct nflict with the NLRB's unit clarification decision, the Court fused to enforce any portion of the arbitration award, holding A. 7):

> "The Company did not apply the OCAW contract to Plant No. 1 because it could not legally do so, for such would have been an unfair labor practice. Having acted in accord with the NLRB decision, how may the Company be liable for damages for refusing to violate the law?"

In refusing to enforce the arbitrator's award, the Court relied n a series of decisions of this Court, primarily *Carey* v. *Vestinghouse Electric Corp.*, 375 U. S. 261 (1964), its own ecisions, primarily *Smith Steel Workers* v. *A. O. Smith Corp.*, 20 F. 2d 1 (7th Cir. 1969), and other court decisions unani- nously agreeing that NLRB decisions take precedence over rbitration awards. The Court thus concluded (A. 11):

> "A complete reading of *Smith*, and its recognition of *Carey* and related cases, makes clear to us the relevance of the supremacy doctrine, and that once the Board has acted, either before or after the arbitrator's award, the Board's order overrides the arbitrator's decision. *Smith*

> further makes it clear that contractual rights cannot exist separately and apart from the union's right to represent the unit."

Rehearing *en banc* was denied by the Seventh Circuit and this Petition for Certiorari was filed.

ARGUMENT AGAINST GRANTING THE WRIT.

Both the Seventh Circuit and the District Court Properly Held That an Arbitrator's Award Which Conflicts with a Decision of the NLRB Cannot Be Enforced.

This Court has long held that decisions of the National Labor Relations Board are supreme over arbitration decisions and that contractual provisions in collective bargaining agreements which conflict with NLRB decisions are unenforceable. This point was well made by this Court in *National Licorice Co.* v. *NLRB*, 309 U. S. 350, 365 (1940):

> "It is sufficient to say here that it will not be open to any tribunal to compel the employer to perform the acts, which, even though he has bound himself by contract to do them, would violate the Board's order or be inconsistent with any part of it."

Similarly, this Court has held that although resort to arbitration may be favored under national labor policy, this policy must be accommodated with, and may be subjugated to, other competing interests. Thus, in both *NLRB* v. *Plasterer's Local Union No. 79*, 404 U. S. 116 (1971), and *U. S. Bulk Carriers, Inc.* v. *Arguelles*, 400 U. S. 351 (1971), this Court ruled that forums other than arbitration—the Federal Courts in *Arguelles* and the NLRB in the *Plasterers'* case—were to resolve the underlying disputes despite the availability of arbitration in both instances.

Both these policies—NLRB supremacy and the subordinate role of arbitration in certain circumstances—coalesced in this

ourt's decision in *Carey* v. *Westinghouse Electric Corp.*, 375 . S. 261 (1964). The Court in *Carey* held that the dispute ere was difficult to classify. Thus, it could be considered either representational dispute—and be resolved by the NLRB rough a unit clarification petition, as it was resolved in this se, or unfair labor practice charges under § 8(a)(5)—or a risdictional dispute—and be resolved by the Board under a 10(k) proceeding with the filing of a § 8(b)(4)(D) charge. n either case, this Court declared, arbitration could have "a ervasive, curative effect," on the dispute, 375 U. S. at 272, and rdered Westinghouse to arbitrate the controversy.

The Court cautioned, however, that the decision of the arbi-ator was not necessarily to be the final word on the contro-ersy. Quite the contrary, for, as this Court noted, such dis-utes were entirely within the province of the NLRB which could nally decide the matter. Thus, the Court held, 375 U. S. t 272:

> "*. . . Should the Board disagree with the arbiter, by ruling, for example, that the employees involved in the controversy are members of one bargaining unit or another, the Board's ruling would of course, take precedence; and if the employer's action has been in accord with that ruling, it would not be liable for damages under § 301.*
>
> * * * * * *
>
> "By allowing the dispute to go to arbitration its fragmentation is avoided to a substantial extent and those conciliatory measures which Congress deemed vital to 'industrial peace;' (Textile Workers v. Lincoln Mills, supra, 353 U. S. at 455, 77 S. Ct. 917) and which may be dispositive of the entire dispute, are encouraged. *The superior authority of the Board may be invoked at any time.* Meanwhile the therapy of arbitration is brought to bear in a complicated and troubled area." (Emphasis added.)

And, as if this did not plainly establish that representation ights as determined by the Board are controlling over the

parties' contract and insulate an employer from any damages flowing from such a contractual breach, as here, the Court reiterated this in a previous passage. Holding that the mere existence of a Board remedy is insufficient to bar a suit "seeking damages for breach of a collective bargaining agreement," the Court went on to say, however, that once "invoked by the employer [the Board remedy] will protect him." 375 U. S. at 268.

Since, as noted above, this Court reiterated in several passages in *Carey* that the Board decision is superior to that of the arbitrator's and that an employer's action in accord with the Board decision would immunize him from damages, Petitioner's claim that the decision in *Carey* on the damage issue was, if not ill-considered, unconsidered—referring to the *Carey* decision on this issue as "inadvertently stated" and "unnecessary dictum"—is hardly supportable. Indeed, the decision on the damage issue emphasizes precisely what "the superior authority of the Board" encompasses.

Petitioner states that the *Carey* decision has led to "a small but developing body of labor law that seems to stand for the proposition that no arbitration award can remedy an employer's violation of its contractual obligations." On the contrary, the body of case law supporting the Seventh Circuit's decision in this case is hardly small, and these cases stand for the proposition, as stated by this Court in both *National Licorice* and *Carey*, that NLRB decisions and the law under the Labor Management Relations Act (LMRA) supersede the parties' collective bargaining agreement.

Significantly, the fact that the Petitioner cannot cite one single court case in which damages have been allowed in a parallel context underscores quite well both the well settled state of the law and the fact that the position the Petitioner articulates has been consistently rejected. In fact, every court which has grappled with the issues raised by this case has either refused to allow arbitration to go forward and hence foreclosed the question of

amages or other remedial relief *ab initio, see, e.g., Smith Steel Workers* v. *A. O. Smith Corp.*, 420 F. 2d 1 (7th Cir. 1969); *IAM Howmet Corp.*, 466 F. 2d 1249 (9th Cir. 1972); *McGuire* v. *Humble Oil & Refining Co.*, 355 F. 2d 352 (2d Cir.), *cert. denied*, 384 U. S. 988 (1966); *Teamsters* v. *Ace Enterprises, Inc.*, 332 F. Supp. 36 (S. D. Cal. 1971); or has refused to enforce the arbitrator's award of damages or other relief, *see, e.g., New Orleans Typographical Union* v. *NLRB*, 368 F. 2d 755 (5th Cir. 1966); *Dock Loaders* v. *W. L. Richeson & Sons*, 280 F. Supp. 402 (E. D. La. 1968);[3] *Ironworkers* v. *Lake County Council*, 347 F. Supp. 1377 (N. D. Ind. 1972); *Local 1547, IBEW* v. *Local 959, Teamsters*, ... F. Supp. ...., 83 LRRM 2785 (D. Alaska 1973).

Two final points should be made. First, although the arbitrator divided his award into two parts, one requiring application of the OCAW contract to Plant No. 1 and the other requiring the payment of damages based upon the failure to so apply OCAW's contract, the two portions of the award, as held by the Seventh Circuit, were inseparable. This is so because, as stated by the Seventh Circuit, in accord with its decisions in *Retail Clerks* v. *Montgomery Ward & Co.*, 316 F. 2d 754 (7th Cir. 1963) and in *Smith Steel Workers, supra*, the Board's unit clarification decision defined the lawful limits of the OCAW contract. In this case, the lawful limit of OCAW's contract, was, according to the Board (the final authority in this matter), the Whiting plant, and the Company could not lawfully apply, even though ordered by the arbitrator, the OCAW contract to Plant No. 1, a facility exclusively represented by the Boilermakers.[4] Since that contract could never lawfully be applied at Plant No. 1, a fact which even

3. Petitioner misstates the facts of *Richeson*. In that case, arbitration went forward and the District Court held that damages would not be allowed because the arbitrator's decision conflicted with the NLRB's work jurisdiction award.

4. Thus, as this Court held in *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 44-45 (1937), "the obligation to treat with the true representative [is] exclusive and hence impose[s] the negative duty to treat with no others."

the Petitioner concedes, the Company cannot be required to pay damages for either not applying it or refusing to violate the law.

Second, the Petitioner claims that the Company unilaterally and voluntarily breached the contract, characterizations we emphatically deny. But, even assuming *arguendo* their applicability here, such phrases, however, carry no talismanic quality, for they are applicable to a number of cases decided by other Circuits which reached conclusions similar to that reached by the Seventh Circuit here.

Thus, in *New Orleans Typographical Union, supra,* the employer voluntarily installed a new piece of equipment which took work away from the Typographers. An arbitrator found that the work was covered by the Typographers' contract, and not the Lithographers', and that the assignment of this work to the latter union encroached on the former's work jurisdiction. The Board held that irrespective of the arbitrator's decision, the work belonged to the Lithographers. The Fifth Circuit denied enforcement of the arbitrator's award and ruled that the NLRB determination took precedence. Thus, even though the employer voluntarily introduced this piece of equipment which deprived one union of work which belonged to it under its contract, the Board's ruling negated any enforcement of the arbitrator's award.

Again, in *IAM* v. *Howmet Corp., supra,* an employer voluntarily shut down a plant represented by the Machinists and laid off the employees there. The Machinists claimed that its contract was to apply to any laid off employees hired at other plants, even though such other plants were represented by other unions. This is precisely the claim made by the Petitioner here. The Ninth Circuit refused to order arbitration of this contractual dispute, since any such employees were now exclusively represented by other unions.

Indeed, this Court's decision in *Carey* presupposes that such a voluntary contractual breach will be made by the employer, but grants protection from liability if the employer's decision is in accord with a later NLRB decision. Thus, this Court in *Carey*

addressed itself to a situation where an arbitrator would have already decided the contractual issue. As such, any actions the employer would take subsequently, contrary to the arbitrator's decision, would plainly be "voluntary" for he would have full knowledge that, according to the arbitrator, he had breached or was going to breach the contract. Yet, this Court held clearly that in such a situation, an employer is immune from damages if he follows a later Board decision, rather than the arbitrator's award.

In short, both the Seventh Circuit and the District Court correctly analyzed the arbitrator's award, its conflict with the NLRB decision and the implications of such a conflict under the LMRA. And, in refusing to enforce the arbitrator's conflicting award, both Courts followed the consistent line of cases in this Court and every single case which has dealt with this issue.

CONCLUSION.

In light of the fact that the Seventh Circuit's decision is in complete accord with this Court's decision in *Carey* and *National Licorce* and in accord with every single case dealing with the issue presented, it is respectfully submitted that this case raises no issues not already well settled under national labor policy and that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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